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Supreme Court of

October T

No. , 1969

U.S. BULK CA 29

ERS, INC.,

Petitioner,

DOMINIC B.

UELLES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ON BEHALF OF U.S. BULK CARRIERS, INC.

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On the Petition

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IN THE

Supreme Court of the United States

October Term, 1969

No.

U.S. BULK CARRIERS, INC., *Petitioner,*

v.

DOMINIC B. ARGUELLES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ON BEHALF OF U.S. BULK CARRIERS, INC.

Petitioner, U.S. Bulk Carriers, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered April 4, 1969, reversing the judgment of the United States District Court for the District of Maryland.

Opinions Below

The official court reporter's transcript of the ruling of the United States District Court for the District of Maryland (Case No. 17796 Civil) as duly made by United States District Judge Alexander Harvey, II on April 26, 1967, granting petitioner's motion for a Summary Judgment, is printed in the appendix hereto, *infra*, pages 1a to 3a. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at F.2d and is printed in the appendix hereto, *infra*, pages 4a to 19a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 4, 1969 and is printed in the Appendix hereto, *infra*, page 20a. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1) and Rule 19 (1b) of the Rules of this Court.

Questions Presented

1. Is a merchant seaman required to invoke and submit to the grievance and arbitration procedures as provided for in the collective bargaining agreement between his employer and his union with respect to disputes arising out of the general terms and provisions of said agreement?

2. In view of the procedures set forth in the Collective Bargaining Agreement, designed and intended to supply a basis for the resolution of contract disputes, was adequate recourse available to the respondent for the purpose of resolving his claims for overtime earnings and penalties for alleged restriction to ship, which said overtime and penalties were, in the first instance, based on the terms and provisions of said contract?

3. Notwithstanding the pendency of the statute of the United States, Title 46, U.S.C., Section 596, which afforded respondent the right to resort to litigation to assert his claims for overtime earnings, was it incumbent upon him to affirmatively pursue the grievance and arbitration procedures established by the Collective Bargaining Agreement before invoking the statutory relief? Or, was it mandatory that said statute be applied for the resolution of respondent's overtime earnings claim despite the existence of the contract which, from its inception, was intended to provide the machinery for the settlement of such disputes?

4. Should the United States Court of Appeals for the Fourth Circuit have abstained from ruling that respondent may pursue the relief provided for in Title 46, U.S.C., Section 596, in view of respondent's admitted refusal to utilize the grievance procedure established by the Collective Bargaining Agreement, and in absence of an affirmative showing that the respondent was refused assistance by his Union in effecting a settlement of his dispute, relating to overtime wages arising while employed aboard petitioner's vessel?

5. In the limited context of the respondent's claim for overtime wages as presented in this case, is he entitled to the special protected status generally afforded to American merchant seamen in the courts of the United States when there was a valid Collective Bargaining Agreement negotiated in his behalf by his Union which contract was intended to protect him while employed aboard petitioner's ship and to resolve disputes that might arise as a result of said employment?

6. Did the United States Court of Appeals for the Fourth Circuit err in reversing the Summary Judgment as initially granted in favor of the petitioner in the United States District Court for the District of Maryland?

Statement

The respondent in this case was employed by the petitioner for service as an ordinary seaman aboard the SS U.S. Pecos. At the time of his employment and subsequent thereto, respondent was a member of the National Maritime Union. His work aboard petitioner's vessel was subject to the terms and provisions of the collective bargaining agreement which was in force at that time. Said agreement contained provisions for grievance and arbitration procedures which were intended for use in the resolution of various disputes, including, but not limited to, the prob-

lems that were initially in issue in the suit instituted by respondent against the petitioner in the United States District Court for the District of Maryland.

Those portions of the collective bargaining agreement relevant to this matter are printed in the appendix hereto *infra*, pages 21a to 32a. The contract was introduced in evidence as joint Exhibit No. 1 at the time of the argument of the petitioner's motion for summary judgment before U.S. District Judge Harvey.

Article I, Section 39 of the agreement (*infra*, p. 21a), established the payoff procedures followed by the petitioner upon the termination of shipping articles of SS U.S. Pecos at Saigon on or about February 18, 1966.

Article II, Sections 1, 2 and 3 (*infra*, p. 22a) contain the grievance procedures to be utilized by the respondent and his fellow union members in resolving disputes arising under this contract.

Article III, Sections 1, 2 and 3 (*infra*, p. 23a) relate to port time, and the penalties, if any, which are relevant to the respondent's claim for 88 hours overtime pay because of his alleged restriction to ship at Cape St. Jacques from February 3, 1966 to February 13, 1966.

Article IV, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 (*infra*, p. 25a) relate to overtime pay and the basis upon which it may be earned aboard ship. These sections bear on respondent's claim for 59 hours overtime pay because of certain work he alleges that he performed aboard ship prior to February 3, 1966.

Article XII, Sections 1, 2 and 3 (*infra*, p. 29a) establish the arbitration procedure intended to be used to resolve any disputes arising out of the interpretation of "any of the provisions of this agreement."

Petitioner's vessel with respondent aboard arrived at Cape St. Jacques on February 3, 1966. The vessel was

required to enter an anchorage at this location and await official clearance to proceed to the port of Saigon. Pratique (quarantine approval) was not granted until February 3, 1966 and the vessel was then cleared to enter the port of Saigon. The pratique and clearance procedures were within the exclusive purview of the port authority at Saigon. Until such time that the vessel was given official clearance to enter the port it was considered as being at sea.

On February 13th, after pratique was granted, and the vessel made its official entry into the port, sea watches were terminated, and crew members not assigned to sea watch were relieved and shortly thereafter cargo discharge was begun. On February 17th, respondent, together with other crew members attended at the office of a United States Consular official in the port of Saigon for the purpose of terminating their employment with the petitioner, and as incident thereto, they signed off shipping articles. Their wage accounts were confirmed by means of individual payroll voucher and they were provided with transportation for return to the United States. The use of payroll vouchers was a customary and an accepted procedure for use by seamen terminating their employment on a foreign port, and was approved by the local consular official in the place and stead of a U.S. Shipping Commissioner.

When the respondent originally obtained employment aboard petitioner's vessel, he signed shipping articles for six months effective August 3, 1965. At the time the articles were scheduled to expire, the vessel was at the anchorage at Cape St. Jacques waiting for its clearance to enter the port of Saigon. The cargo then in the vessel had been loaded prior to February 3, 1966 and the articles were, in effect, extended until said cargo was completely discharged. That discharge was completed at Saigon on February 18, 1966.

The petitioner delivered its wage voucher to the respondent on the same day that his employment aboard SS

U.S. Pecos was terminated. The payoff procedure utilized before the U.S. consular official at Saigon, whereby the respondent was provided with a payroll voucher, was effected within 24 hours before completion of the discharge of the vessel's cargo and was in compliance with Title 46, U.S.C., Section 596 as well as Article I, Section 39 of Collective Bargaining Agreement (*infra*, p. 21a). Because of local currency restrictions, United States dollars were not distributed to the respondent, in Saigon, in an amount greater than that deemed necessary to meet his expenses in transit. Upon his return to the continental United States, respondent proceeded to Galveston, Texas, where he presented his payroll voucher to petitioner's local agent and he was then paid the balance of his earned wages.

The respondent now claims that he has not been paid overtime earnings due to him because of certain work performed aboard petitioner's vessel. He states that said sum approximates $277.83. He does not claim that there was an improper deduction from his earned wages, but he asserts that he worked more overtime hours than were authorized for payment by his superiors aboard ship. Respondent has testified that he discussed this matter with a representative of the National Maritime Union at Galveston and he was instructed to write to the Union port agent at Yokohama, Japan with a request that he look into the matter. The N.M.U. agent at Yokohama apparently had initial jurisdiction over disputes relating to the union agreement overtime wage provisions and associated matters which arose aboard vessels paying off crew members in the port of Saigon or elsewhere in the Far East. Respondent's claims for overtime wages, restriction to ship, and delayed payoff are all matters which are intended to be resolved in accordance with Article II "Grievances", Sections 1, 2 and 3 (*infra*, p. 22a).

It was also provided that such matters may be submitted to arbitration, see Article XI, Sections 1, 2 and 3 (*infra*, p. 29a), if a satisfactory adjustment could not be

effected by means of the grievance procedure. Such disputes could, without delay, be referred to the designated impartial arbitrator who is available to hear and resolve same.

Respondent's claims in this case arise under the union agreement which had been negotiated for the purpose of covering the terms and provisions of his employment aboard petitioner's vessel. However, he elected to proceed independently to assert the cause of action alleged in this litigation, in abrogation of the working agreement, despite the fact that the rights he seeks to enforce were created by the terms and provisions of the same agreement. After reviewing the matter on motion for summary judgment, the District Court made its ruling that respondent's claims should have been resolved by means of the procedures established by the Union Agreement. Subsequently, that ruling was presented to the United States Court of Appeals for the Fourth Circuit for review on the respondent's appeal. The judgment of the District Court was reversed on the basis of a divided decision, two Circuit Court judges favoring the respondent's position and one Circuit Court judge favoring the petitioner's cause in a dissenting opinion.

Summary of Argument

When this matter was reviewed in the United States District Court at Baltimore, petitioner asserted that the parties having entered into a valid agreement which created the alleged basis for the overtime earnings that respondent sought to recover, the parties were bound by the terms and provisions of the entire agreement. District Judge Harvey relying on this Court's decisions in the cases of *Republic Steel Corporation* v. *Maddox*, 379, U.S. 650, at 652-653, 85 S.Ct. 614, at 616, 13th L.Ed. 2nd 850 at 853; *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed. 2nd 842; and the related rulings in the cases of *Freedman* v. *National Mari-*

time Union and American Export Isbrandtsen Lines, Inc. (2nd Cir. 1965), 347 F. 2nd 167, cert. denied 383 U.S. 917 86 S.Ct. 910, 15 L. Ed. 2nd 671; *Brandt* v. *United States Lines, Inc.*, 246 F.S. 982 (S.D.N.Y. 1966), decided that the respondent failed to process his grievances pursuant to the procedure established by the Union contract and accordingly awarded judgment in favor of the petitioner. In said ruling the court asserted that "the evidence does not disclose that plaintiff took proper or sufficient steps in processing his grievances pursuant to the grievance procedure that was set up" (*infra*, p. 2a).

Thus in the absence of an affirmative showing of bad faith on the part of respondent's union representatives acting as his collective bargaining agent, he is required to follow the procedure outlined in his union contract for the resolution of disputes arising under the provisions of the agreement. In this case, he has engaged counsel to assist him but counsel has not seen fit to initiate the appropriate steps to resolve this matter pursuant to the agreemen. Instead, he has resorted to litigation without exhausting his "administrative procedures" in the first instance.

The Circuit Court of Appeals for the Fourth Circuit in its majority opinion stated that the granting of a summary judgment by the District Court was "tantamount to a ruling that the Court lacked jurisdiction" (*infra*, p. 11a). Petitioner does not share this view. What was implied in the ruling of the lower Court and in the decisions of this Court in *Republic Steel* v. *Maddox, supra*; *Vaca* v. *Sipes, supra*, was that respondent is obligated to utilize his contract grievances procedures before resorting to litigation. The effect of the majority opinion of the Circuit Court is to undermine the Collective Bargaining Agreement which was negotiated and implemented to lend logic and reason to the relationship of merchant seamen with their employers. The contract was intended to control working

conditions aboard ship. Such a stabilized labor climate has been a long desired objective of the Maritime Industry in the United States.

The indicated procedure in the present case is that of equitable abstention. In the terms and provisions of the Union Agreement will be found an adequate procedure to resolve the respondent's claims. The Circuit Court of Appeals should have abstained from imposing the federal statute, Title 46 U.S.C. 596 as the means for solving the respondent's problems in absence of a showing that the contract procedure was inadequate to afford the desired relief. They should defer to the operation of the Collective Bargaining Agreement at least in the first instance. Analogous results may be found in the decisions in the cases of *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971; and *Jehovah's Witnesses of the State of Washington et al.* v. *King County Hospital Unit, No. 1 et al.*, 278 F.S. 488 at 505-507. The Courts in these cases held that the federal courts should defer to the State Courts in the consideration of and application of State statutes. In practical application, the imposition of the statute in this case frustrates the original intention of the parties as expressed in their contract and the court should, as this court so correctly ruled, abstain from intervening in such a relationship until it is proven a fair effort by the parties to settle their dispute has met with failure.

Chief Judge Haynsworth, in his dissenting opinion (*infra*, p. 16a), recognized the need to assume a modern posture in reviewing the issues presented in the case. Today, American merchant seamen are protected by collective bargaining agreements that have been forged out of repeated strikes and negotiations. The relation of the seaman with his employer has evolved far beyond the conditions described by Mr. Justice Story in his decisions in the cases of *Harden* v. *Gordon* (C.C. Me. 1823), 11 Fed. Cas.

480 (No. 6047); and *Brown* v. *Lull* (C.C. Mass. 1836), 4 Fed. Cas. 407 (No. 2918). Such men no longer man our United States merchant vessels. They are protected by zealous representation of their unions. The improvident seamen of Mr. Justice Story's day were relevant to the nineteenth century and required statutory protection from the rigors of shipboard working conditions and the shipowners of more than one hundred and thirty years ago.

Chief Judge Haynsworth aptly summarized the situation (*infra*, p. 16a) as follows:

> "I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which seaman is represented by union representative, skilled in the interpretation of the collective bargaining agreement upon which the claim is based."
>
> The statute upon which the plaintiff relies has a long history. Its forerunners were enacted at a time when there was not an uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring to lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working condition or to lend him protection at the time of discharge. The statute protected seamen 'from the harsh consequences of arbitrary and unscrupulous action of their employers to which, as a class, they are peculiarly exposed.' "

Title 46 U.S.C. Section 596 has its origin in the Act of the United States Congress of July 20, 1790. The latest modification was enacted on March 4, 1915, when the penalty for non-payment of earned wages was increased from a single day's pay for each day of delay (enacted on December 21, 1898) to two days' pay for each day of delay. The statute does not impose a mandatory procedure for the purpose of resolving disputes between the American

merchant seaman/employee and his shipowner/employer, and to that extent it is submitted that the courts should abstain from abrogating the contract rights of the parties which will be the result in this case if the majority opinion of the Circuit Court of Appeals of the Fourth Circuit remains unchanged.

Reasons for Granting the Writ

1. In this case, petitioner has not been charged with an unauthorized deduction of money from earned wages in the context of *Johnson* v. *Isbrandtsen Co., Inc.*, 343 U.S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294. Respondent claims that he is entitled to receive certain overtime earnings as the result of his work aboard SS U.S. Pecos and petitioner disputes the fact that the respondent earned such wages. While the issues of fact so presented may be resolved by means of a trial of the action in the District Court, nevertheless petitioner seeks a review by this Court to determine whether it is mandatory for the application of the Title 46 U.S.C. Section 596, a statute with its roots in the Eighteenth Century, the initial enactment date being July 20, 1790, ch. 29, Section 6, 1 stat. 133, when a collective bargaining agreement designed to provide a basis for resolving such problems has been put into effect for the express purpose of settling such matters that may arise in the day to day relationship of the American merchant seaman, employee with his American merchant vessel owner/employer, in this the last third of the twentieth century.

2. The collective bargaining agreement, and more specifically those sections set forth (*infra*, pp. 21a to 32a) herein offered for consideration evolved over the past thirty years or more, by dint of hard negotiation, work stoppages and repeated strikes, express the wishes of the parties thereto and in its present state appears better suited to the practical resolution of the conflicts that may

arise between the American merchant seaman and his employer. Title 46 U.S.C., Section 596 and its predecessor legislation was designed and intended to protect certain rights of seamen employed aboard merchant vessels prior to the advent of effective collective bargaining, and while certain limited applications may remain relevant today, it does not supply a practical basis for relief in cases such as the one at hand. In view of the pendency of said statute it falls within the province and authority of the United States Congress to amend or rescind said legislation; however, the progress of labor relations in the maritime industry in the United States suggests that said legislation is relatively impractical and to a large degree inadequate to resolve problems pertinent to modern day shipping. It is submitted that this Court should endorse the practice of equitable abstention in the Courts of the United States, in maritime wage causes, when it appears that the collective bargaining agreement is sufficient to supply the relief being sought. The application of the doctrine of equitable abstention will provide a basis for restraining the exercise of Federal jurisdiction, in the first instance, when adequate relief may be provided by other means. This does not mean that the Court lacks jurisdiction as suggested in the Circuit Court ruling (*infra*, p. 11a) but it will allow the Trial Court to abstain from acting in a dispute wherein a valid labor contract may supply equitable and just relief to the parties.

In the instant case, the collective bargaining agreement has a grievance and arbitration procedure designed to provide adequate relief in situations involving overtime wage disputes or other rights accruing to the parties by virtue of the terms and provisions of the said contract. These procedures are designed to be applied promptly to supply the desired relief and avoid the delay and expense of a Court proceeding.

3. This court in its rulings in the cases of *Republic Steel Corporation* v. *Maddox*, *supra*, and *Vaca* v. *Sipes*, *supra*, indicated that collective bargaining agreement grievance and arbitration procedures are preferable to court action in the resolution of employer/employee disputes that fall within the purview of the provision of such agreements. While the decisions in these cases were not concerned with American merchant seamen, *per se*, two cases, *Freedman* v. *National Maritime Union et al.*, *supra*, and *Brandt* v. *U.S. Lines*, *supra*, held that said principles were relevant to the problems presented in such cases. Today the American merchant seaman enjoys the same status as his shoreside counterpart. He has a strong union which actively protects his interests and supplies him with effective presentation in dealing with his maritime employer. It does not appear that the seaman continues to require the special preference previously afforded him as a litigant in our Courts. In the days of the sailing ship, the time-honored status of "ward of the admiralty" as granted by Mr. Justice Storey in *Harden* v. *Gordon*, *supra*, and *Brown* v. *Lull*, *supra*, no longer appears relevant, now that the age of sail has given way to the age of the atom. May not this Court now consider as obsolescent the application of those statutes intended to meet the pressing needs of that era in view of today's acceptable substitutes, at least in the limited context of this case.

4. The respondent's cause of action as based on rights and privileges created by the collective bargaining agreement should be resolved by the grievance and arbitration procedures established for resolution and disputes by the terms and provisions of this same agreement. In the past it has been the role of this court to select those cases and hear the argument of counsel which may tend to affect the rights of larger groups or segments of our society than those of the immediate litigants in the particular case before it. It also appears to be the intention of the court to

enunciate principles to guide the future actions and outline the rights of said groups or segments of our society while at the same time giving justice to the parties to the immediate cause. In this case, the validity of the grievance and arbitration machinery in the collective bargaining agreement involved herein and those generally in force in various industries in and about the United States may be implemented and strengthened by a ruling in favor of the petitioner in this case. A contrary ruling may have a tendency to weaken the effectiveness of said agreements and it is submitted that a writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit in order that full consideration may be given to the problem involved at this propitious time.

5. It is widely believed that this court has an interest in resolving apparent conflicts in the rulings of the Circuit Court of Appeals where they may appear to exist in decisions involving similar points. In the immediate case, there was a divided decision in the Fourth Circuit Court of Appeals. Two judges asserting one point of view with respect to the applicability of Title 46 U.S.C. Section 596. The third member of the bench of that Court issued a separate and dissenting opinion. There is therefore a diversity in the judicial thinking with respect to the issues presented herein. Thus, in further support of the petition for the writ of certiorari, it is suggested such a diversity of judicial consideration, in dealing with a subject which affects the general interest of many people, will be benefited by a further review and final determination on the relevant points in this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: Baltimore, Maryland,
June 20, 1969.

Respectfully submitted,

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GEORGE W. SULLIVAN
and
WILLIAM J. LITTLE
On the Petition

(APPENDIX)

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

No. 17796 Civil

DOMINIC B. ARGUELLES,

vs.

U. S. BULK CARRIERS, INC., a body corporate.

Baltimore, Maryland
Wednesday, April 26, 1967

Before the HONORABLE ALEXANDER HARVEY, II, U. S. District Judge, at 10 a.m.

Appearances:

I. DUKE AVNET, Esq.,
Attorney for Plaintiff.

GEORGE W. SULLIVAN, Esq.,
WILLIAM J. LITTLE, Esq.,
Attorneys for Defendant.

RULING OF THE COURT

The Court: This matter arises on the defendant's motion for summary judgment, with attached affidavit and copies of certain exhibits, including the deck log of the ship.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

The plaintiff has filed an answer to the motion, together with an affidavit and memoranda of law.

The agreement, NMU Agreement, has been introduced in evidence as Joint Exhibit Number 1.

The deposition of the plaintiff has been filed.

The Court feels that this case should be controlled by the general principles of Maddox—that is, Republic Steel Corporation versus Maddox, 379 U. S. 650—and the more recent decision of the Supreme Court in Vaca versus Sipes, a decision handed down on February 27, 1967, reported in 35 Law Week 4213 and also the more recent decision of Judge Northrop in Brown versus Truck Drivers, Local Union Number 355, in this Court, the opinion being filed March 8, 1967. I don't have a published reference for that opinion. That is Number 17858 in this Court.

I think this case in particular shows the importance of having grievance machinery to deal with problems of this sort. Here we have a claim of some $500 which is being submitted to the Federal Court. It is the net claim after the deduction of what has been admittedly received for air fare, and the Court is asked to decide questions involving overtime and payment of a statutory penalty.

The Court finds that the issues here do amount to a dispute under the Union Agreement both as to the overtime and as to the statutory penalty.

The Court further finds that the evidence does not disclose that the plaintiff took proper or sufficient steps in processing his grievance pursuant to the grievance procedure that was set up. He did not even write a letter to the union representative. He talked to a union representative in Texas and then apparently decided to take the matter into Federal Court.

The policy established by the cases referred to, that matters of this sort should be left to procedures set up between the union and the employer, is, in the opinion of

the Court, a most important policy lest this Court be inundated with small claims of the type which has been presented to the Court today.

The Court expresses no view as to the merits of the claim but does hold that the claim must be processed in accordance with procedures established in the Agreement.

Therefore, the motion for summary judgment will be granted; and I will ask counsel for the defendant to prepare and submit an order showing it to Mr. Avnet.

(Thereupon, at 11:00 a.m., the aforecaptioned proceedings were concluded.)

REPORTER'S CERTIFICATE

I, GEORGE G. DAVIS, JR., certify the foregoing as the official transcript of the proceedings indicated.

GEORGE G. DAVIS, JR.
Official Reporter

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES,

Appellant,

VERSUS

U. S. BULK CARRIERS, a body corporate,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore, ALEXANDER HARVEY, II, District Judge.

(Argued January 12, 1968. Decided April 4, 1969)

Before HAYNESWORTH, Chief Judge, BORMAN and BRYAN, Circuit Judges.

I, DUKE AVNET (AVNET and AVNET on brief) for Appellant, and GEORGE W. SULLIVAN (WILLIAM J. LITTLE on brief) for Appellee.

BOREMAN, *Circuit Judge*:

This suit was brought by Dominic B. Arguelles, a merchant seaman, for wages, including earned overtime,

reimbursements, and statutory penalties for delay in payment of wages, all allegedly due from the defendant, U. S. Bulk Carriers, his employer. Jurisdiction is asserted under 28 U.S.C.A. § 1333, the case involving admiralty and maritime claims. Defendant's motion for summary judgment was granted for the reason that the seaman had not used the grievance machinery and procedure provided by a collective bargaining agreement between his labor union and his employer. From the order granting summary judgment plaintiff appeals. We reverse.

The plaintiff, a merchant seaman and a citizen of the Philippine Islands, has been a resident of Baltimore, Maryland, for a number of years. He joined the American merchant vessel, S/S "U. S. Pecos," at Galveston, Texas, on August 3, 1965, as ordinary seaman on six month articles of employment at the agreed monthly wage of $304.90. Six months later, on February 3, 1966, the vessel, with cargo to be discharged at Saigon, South Vietnam, arrived off Cape St. Jacques where it remained at anchor until February 13, 1966. This delay was admittedly due to the fact that there were several other vessels awaiting their turns to discharge cargo ahead of the Pecos. On February 13, 1966, with pilot and customs officer aboard, the vessel proceeded from its anchorage and arrived some six and one-half hours later at designated Buoy No. 13 in the Port of Saigon. The plaintiff, however, claims that he was entitled to be discharged and put ashore on February 3, 1966, and to be paid within four days thereafter.

The vessel's Deck Log was before the court as an exhibit filed with the defendant's affidavit in support of its motion for summary judgment. This log shows an entry on February 3, 1966, as follows: "Free pratique and custom clearance not authorized at this anchorage." The log further shows that the vessel was granted pratique and clearance on February 13, 1966, after the vessel was secured to Buoy No. 13 in the Port of Saigon. In his deposition

plaintiff stated that on another occasion within his six month period of service when the vessel was at anchor at a point near the anchorage of February 3, he was granted shore leave and transportation ashore was provided by the ship.

Before and from the time of arrival at anchorage off Cape St. Jacques, and until arrival in the Port of Saigon, sea watches were constantly maintained. These watches were broken on February 13 *in* the Port of Saigon. While at anchorage off Cape St. Jacques frequent anchor bearings were taken each day. Unloading of cargo commenced in the Port of Saigon on February 16, 1966. Discharging of approximately 350 tons of cargo was concluded on February 18, 1966.

The Deck Log for February 17, 1966, reflects an entry indicating that plaintiff and certain other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate. The Deck Log for February 18, 1966, shows an entry indicating that other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate.

It is undisputed that plaintiff was given a voucher in the presence of the U. S. Consul at Saigon, calling for payment at Galveston, Texas, of all of his agreed basic monthly salary then due at the rate of $304.90, and that the master of the Pecos gave to plaintiff and each repatriated crewman the sum of $50.00 in American money for food and miscellaneous travel expense en route to the U.S.A. Plaintiff was provided also with a ticket calling for first class air travel and accommodations from Saigon to Galveston, Texas.

In his deposition plaintiff explained that his departure with his companions from Saigon was delayed from February 17 until the following day, February 18, because they had an argument with the U. S. Consul over their demand for payment in U. S. dollars rather than by voucher. As a

consequence plaintiff missed his flight on February 17, could not get first class air transportation on the following day and traveled second or "tourist class" from Saigon to Los Angeles, California. However, from Los Angeles to Houston, Texas, he traveled first class by air. Instead of flying on to Galveston, as his ticket provided, plaintiff, with companions, elected to go by limousine from Houston to Galveston, his share of the cost being $6.50. Four days later, on February 22, 1966, plaintiff presented himself at the office of Bulk Carriers in Galveston and was paid the amount specified in the voucher presented to him at Saigon. There is nothing in the record to support the plaintiff's claim in his brief that, through fault of the defendant, he had to wait a few days in Galveston before he was paid off there on February 22, 1966.

Plaintiff initially sought judgment for the following:

(1) A sum representing the difference between the cost of a ticket for first class air travel from Saigon to Galveston provided by Bulk Carriers and the cost of less expensive air transport accommodation actually provided, plus an excess baggage charge of $8.50 from Los Angeles to Houston and shared limousine expense of $6.50 from Houston to Galveston.

(2) Balance of claimed overtime earnings of which $59.50 was allegedly attributable to overtime work claimed to have been performed on the vessel prior to February 3, 1966, and $38.00 of claimed overtime compensation because he was unjustifiably restricted to the vessel for eleven days in South Vietnam.

(3) *Statutory penalty* of $254.95 on account of claimed delay in payment of wages calculated on the basis of two days' pay for each day from February 3, 1966, to February 22, 1966, less the first four days, or for a net period of fifteendays.[1]

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[1] Title 46 U.S.C. § 596 provides, in pertinent part, that the master or owner of any vessel making foreign voyages shall pay to every

During the course of proceedings it was suggested to the plaintiff that he could obtain an adjustment directly from the air carrier of the difference between the cost of first class air travel and the cost of less expensive accommodation. Acting upon this suggestion the plaintiff obtained such adjustment and this claim was abandoned. In argument counsel for the plaintiff referred to the items of $8.50 for excess baggage charge and $6.50 for limousine expense as "minor items" of little importance. In any event, there is no explanation which would show any necessity for the limousine expense from Houston to Galveston since plaintiff's airline ticket admittedly covered transportation between those points. The $50.00 in cash for miscellaneous travel expense would more than cover the excess baggage item of $8.50. Thus, all that remained of the original claims were the claims for overtime earnings [2] and the statutory penalty for delayed payments as provided in 46 U.S.C. § 596.

It appears that there were two factual issues to be resolved: (1) Whether the plaintiff was entitled to overtime compensation during his period of service aboard ship

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seaman his wages within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner prescribed *without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable *"as wages in any claim made before the court."* (Emphasis added.)

[2] Overtime pay is embraced within the meaning of "wages." See *Monteiro* v. *Sociedad Maritima San Nicolas S.A.*, 280 F.2d 568, 573 (2 Cir. 1960); Norris "The Law of Seamen," Vol. I, sec. 47, pp. 76, 77.

prior and subsequent to February 3, 1966; (2) whether the master's delay of fifteen days after February 3, 1966, in the payment of plaintiff's wages was "without sufficient cause" within the meaning of § 596.

As hereinbefore shown Arguelles signed six months' shipping articles commencing August 3, 1965. When the Pecos was anchored at Cape St. Jacques and awaiting instructions to proceed to Buoy 13 in the Port of Saigon it was carrying cargo which had been loaded prior to February 3, 1966. In the affidavit filed with defendant's motion for summary judgment affiant describes himself as Manager of Marine Personnel for the defendant, Bulk Carriers, and states only that his knowledge and information of the matters set forth "were acquired by him in the course of his employment by said corporation"; he then states in the affidavit that, since the cargo had been loaded within the six-month period prior to February 3, 1966, the shipping articles were automatically extended until the cargo was completely discharged. The articles are not filed with the affidavit and do not appear in the record. Rule 56(e) F.R. Civ.P. provides that such an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." An affidavit based upon information acquired by affiant in the course of his employment as Manager of Marine Personnel, without more, would not meet even the minimum requirements of Rule 56(e). The sufficiency of this affidavit was challenged in plaintiff's answer to the motion for summary judgment.

It is agreed that plaintiff was a member of the National Maritime Union of America, an affiliate of AFL-CIO, and that there was a working agreement between the union and various companies and agents, including the defendant.[3]

[3] This agreement was introduced in evidence as Joint Exhibit No. 1.

In substance the agreement provides that an employee who feels he has been unjustly treated or subjected to unfair consideration shall endeavor to have his grievance adjusted by pursuing certain grievance procedures and if a mutually satisfactory settlement is not thereby affected the dispute will be promptly referred to an impartial arbitrator for decision and disposition.

The plaintiff claims that he rightfully demanded that he be put ashore and demanded payment of his wages; that these demands were refused; that when the voucher was paid at Galveston, Texas, he demanded overtime pay, adjustment of the difference in the cost of inferior flight accommodations actually provided an accommodations as agreed, and the other minor items expended for excess baggage charges and limousine fare but the demands were refused; that he then complained to the Galveston representative of his union but was advised to write a letter to the union representative in Yokohama, Japan and report his alleged mistreatment. Instead of writing the letter plaintiff went to Baltimore, employed counsel and this litigation followed. The defendant denied all of plaintiff's claims. It is agreed that no steps were taken under the grievance procedure of the collective bargaining agreement in an effort to resolve the disputes which has arisen between plaintiff and his employer.

In a short statement, orally from the bench, the district court expressed no view as to the merits of the dispute but granted the motion for summary judgment, holding in effect, that the plaintiff's claim must be processed in accordance with procedures established in the collective bargaining agreement, that matters of this sort should be left to procedures set up between the union and the employer pursuant to the "policy" established primarily in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965); and *Vaca* v. *Sipes,* 386 U.S. 171 (1967), a policy characterized by the district court as most important "lest this Court

be inundated with small claims of the type which has been presented to the court today."

In granting the motion for summary judgment the court denied to the plaintiff a hearing on the merits and it clearly appears that there were genuine issues of material fact which could not be resolved on the basis of the pleadings, deposition, or the insufficient affidavit filed by the defendant in support of its motion. Summary judgment was granted on the ground and for the reason that the plaintiff's claims *must* first be processed in accordance with procedures established in the agreement between his employer and the union. This determination was tantamount to a ruling that the court lacked jurisdiction.

Title 28 U.S.C. § 1333 provides:

> "The district courts shall have original jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The controversy here was between a merchant seaman and the owner of an American merchant vessel, a controversy maritime in nature, and the cause of action was based, at least in part, upon the alleged violation by the defendant of a federal statute providing panelties for delay in the payment of plaintiff's wages "without sufficient cause."

The pertinent statute, 46 U.S.C. § 596, provides, in substance, that any sum found to be due as a penalty for such delay shall be recoverable "as wages in any claim made before the court." We think the phrasing of the statute, "in any claim made before the court," is highly significant in the context of the instant case and carries the clear implication that the district court should determine whether payment of wages was delayed and, if so, should award to plaintiff the prescribed penalty "as wages" unless the cause for such delay is found to be "sufficient."

Since ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them.[3] The right to prompt payment of seamen's wages is especially favored by the law. The official concern for seamen, this very useful band of men, is motivated more by practical than by romantic considerations. Their contribution is seapower and manifests itself in commerce and national defense.[4] To assume their special position in the scheme of things judicial, seamen are treated as wards of the admiralty. Only recently the Supreme Court of the United States spoke of "the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." *Calmar S.S. Corp.* v. *Taylor,* 303 U.S. 525, 528.

To effectuate this well-established governmental and judicial policy the Congress has enacted statutes to insure prompt payment to the seaman of wages due him. As provided in 46 U.S.C., § 596, wages in foreign trade are due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever happens first, and he is entitled to one-third of his wages at the time of discharge. If the master fails to pay seamen, "without sufficient cause," the master or the owner is subjected to the payment of double wages for each day of delay. Vigorous judicial interpretations have been given to the wage statutes. The Supreme Court has said that the statutes pertaining to the payment of wages intend to secure *prompt* payment and are designed to prevent "arbitrary refusals to pay wages, and to induce prompt payment when payment

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[3] Benedict on Admiralty, Vol. 4, sec. 621, p. 282.

[4] A well documented discussion by Judge Frank concerning the historical protection of seamen is found in *Hume* v. *Moore-McCormack Lines,* 121 F.2d 336 (2 Cir. 1941), *cert. denied,* 314 U.S. 684.

is possible.'"[5] The courts strongly disapprove denial of prompt payment of seamen's wages rightfully due them.[6] The wage statutes are to be liberally construed in favor of the seaman.[7] As hereinbefore noted, overtime pay is embraced within the meaning of wages. If delay in payment of wages is established the burden of proof is on the ship owner to show that his delay was justified.[8]

The district court, in reaching its decision, relied principally upon recent cases which hold that where an employee seeks to sue his employer and/or his union on account of an alleged breach of his collective bargaining *rights emanating from a collective bargaining contract* between his employer and his union he must first show that he has attempted to pursue the contract grievance procedure as his mode of redress. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Only if the union refuses to press the claim or if it presses it perfunctorily, then the employee may seek redress in the courts. *Republic Steel Corp.* v. *Maddox, supra; Vaca* v. *Sipes*, 386 U.S. 171 (1967). In *Vaca* v. *Sipes* the Court stated:

> "* * * Since the employee's claim is based upon *breach of the collective bargaining agreement*, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.

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[5] *Collie* v. *Ferguson*, 281 U.S. 52, 56 (1930). Involved was 46 U.S.C. § 596. Insolvency of the owner and arrest of the vessel were held to be "sufficient cause" for delayed payment of wages and to relieve the owner from the statutory liability for double wages.

[6] *Prindes* v. *The S.S. African Pilgrim*, 266 F.2d 125, 128 (4 Cir. 1959); *The Sonderborg*, 47 F.2d 723 (4 Cir.), *cert. denied*, 284 U.S. 618 (1931); *The Lake Gaither*, 40 F.2d 31 (4 Cir. 1930).

[7] *Johnson* v. *Isbrandtsen Co.*, 190 F.2d 991, 993 (3 Cir. 1951).

[8] *Butler* v. *United States War Shipping Administration*, 68 F. Supp. 441, 443 (E.D. Pa. 1946).

> For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650." (386 U.S. at p. 184.) (Emphasis supplied.)

The defendant cites certain cases purporting to show that the courts have been applying the principles approved in *Maddox* and *Sipes* to the maritime area of the law. Reference is made to *Freedman* v. *National Maritime Union of America*, 347 F.2d 167 (2 Cir. 1965), *cert. denied*, 383 U.S. 917 (1966); and *Brandt* v. *U. S. Lines*, 246 F. Supp. 982 (S.D.N.Y. 1964).

Freedman, supra, involved a charge by a seaman of improper discharge by the employer. The latter contended that the plaintiff seaman had disobeyed an order to steer the vessel properly. The U. S. Coast Guard had previously found the plaintiff guilty in connection with the same incident and had disciplined him. After investigation the plaintiff's union refused to arbitrate the grievance. Prior to litigation, because of the company's refusal to rehire him and the union's failure to prosecute his grievance, plaintiff had filed a series of charges with the National Labor Relations Board. Finding no basis to support plaintiff's claim of discriminatory treatment, no complaint was issued. The district court granted the defendant's motion for summary judgment, ruling that the papers which had been submitted demonstrated that the plaintiff was not discharged without cause, that the union did not act in bad faith and that plaintiff's charges of conspiracy and fraud were conclusory.

Brandt, supra, concerned a similar charge by a seaman of unfair discharge. After the union had investigated it concluded that the case lacked merit and refused to seek arbitration. The seaman sued both the employer and the

union to compel them to arbitrate the propriety of his discharge. Summary judgment was granted in favor of the defendants since there were no facts alleged from which the court or jury could reasonably find that the union acted arbitrarily or in a discriminatory manner.

The vital point of distinction between *Maddox, Sipes, Freedman* and *Brandt* on the one hand, and the instant case on the other, is that here the plaintiff is seeking the judicial adjudication or enforcement of his rights created by a federal statute which applies solely to seamen and the payment of their wages.

In the case of *Lakos* v. *Saliaris,* 116 F.2d 440 (4 Cir. 1940), there is involved the interpretation and application of Title 46, U.S.C. § 597, which also pertains to the payment of seamen's wages. One of the questions presented was whether a "war bonus" to be paid in addition to basic wages constituted "wages" within the meaning of the statute. There it was held that the courts of the United States are required to assume jurisdiction of such a controversy arising under the statute.

The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer is an additional mode of redress for such seaman and which he may pursue, at his election. However, such procedure is of fairly recent vintage, having matured in viable form during the period when labor was making substantial gains on the economic front. Section 596 antedated by long years the grievance procedure provided in the union contract. To construe the grievance procedure as a mandatory substitute for the seaman's statutory right to prompt payment of his wages is, in our opinion, palpable error. Statutes enacted out of considerations of public policy, such as section 596 pertaining to seamen's wages, should not and cannot be nullified or circumvented by private agreement.

In our research of this question we discovered numerous cases in which the amounts involved were much less than the amounts claimed by the plaintiff in this case. We need not specifically cite these cases but, in passing, we are prompted to note them in light of the district court's expressed fear that it will be inundated with small claims of the type involved in the instant case.

The case will be reversed and remanded to the district court for further proceedings consistent with the views herein expressed.

Reversed and Remanded.

HAYNSWORTH, *Chief Judge,* dissenting:

I dissent.

The claims pressed by Arguelles are almost totally dependent upon an interpretation and application of the collective bargaining agreement between his labor union and his employer. Arguelles invokes that agreement; he is bound by it, including its requirement of resort of its grievance and arbitration and procedures for the settlement of contract disputes. The majority forgoes the obvious advantages of having such claims adjudicated within the framework of that agreement because it perceives that the special protection traditionally accorded seamen with respect to prompt payment of wages as evidenced by 46 U.S.C.A. § 596 requires that wage claims be heard initially in a district court. I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which the seaman is represented by a union representative skilled in the interpretation of the collective bargaining agreement upon which the claim is based.

The statute upon which the plaintiff relies has a long history. Its forerunners[1] were enacted at a time when there was a not uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring a lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working conditions or to lend him protection at the time of discharge. The statute protected seamen "from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Ferguson*, 281 U.S. 52, 55 (1930).

The circumstances requiring protection of seamen from discharge in foreign ports without sufficient funds are now largely dissipated. Though the dissipation may have resulted, in large part, from the existence of the statute, collective bargaining agreements now bar the return of the harsh practices of the Eighteenth Century.[2] The collective bargaining agreement and the maritime union stand as protection to the seamen, guarding against overreaching by the employer. When a claim under the statute is wholly, or largely, dependent on an interpretation and application of the collective bargaining agreement, the purpose of the

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[1] Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133; Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

[2] I do not mean to intimate that the statute has no continuing utility. Clearly the union and the employers could not, under the guise of the collective bargaining agreement, negate seamen's rights under the statute. Nor would I require resort to grievance procedures when a claim is based entirely upon the statute. *See, e.g., Prindes* v. *S.S. African Pilgrim*, 4 Cir., 266 F.2d 125 (wrongful withholding of amount admittedly due in order to secure release to claim for further wages). Suits under the statute should also be allowed when no other means to adjudicate the claim is clearly or readily available. *See, e.g., Gkiafis* v. *S.S. Yiosonas*, 4 Cir., 387 F.2d 460 (claim of foreign seaman).

statute is not frustrated by resort to grievance procedures established between the employer and the union.

To be balanced against the purpose of the act providing for prompt payment of wages of seamen, 46 U.S.C.A. § 596, is the purpose of the federal labor laws. These laws "seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." *Vaca* v. *Sipes*, 386 U.S. 171, 182. When a claim is based on the terms of the collective bargaining agreement,[3] the Supreme Court, interpreting § 301(a) of the Labor Management Relations Act,[4] has required resort to the grievance processes under that agreement.[5]

> Since the employee's claim is based upon the breach of the collective bargaining agreement, he is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the em-

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[3] The claim here is based almost entirely on the collective bargaining agreement. The overtime wage claim is dependent upon an interpretation of the agreement. The statutory claim under 46 U.S.C.A. § 596 requires an interpretation of the agreement to answer the question whether the ship was in port while anchored off Cape St. Jacques.

[4] 29 U.S.C.A. § 185(a).

[5] *See TWUA* v. *Lincoln Mills*, 353 U.S. 448; *General Electric Co.* v. *Local 205, UEA*, 353 U.S. 547; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650; *Vaca* v. *Sipes*, 386 U.S. 171. Not only is resort to arbitration required but courts should refuse to review the merits of an arbitration award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

ployee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.

Vaca v. *Sipes, supra* at 184.

Mandatory use of grievance procedures is of great benefit both to the employer and to the union. And it cannot be said, "in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted the procedures and found them so. . . . If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' " *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653.

I see nothing in the language or purpose of 46 U.S.C.A. § 596 which requires the disruption of collective bargaining agreements governing maritime claims contrary to the intention of Congress as expressed in § 301(a) of the Labor Management Relations Act.[6] I would require the use of union grievance and arbitration procedures in settling a seaman's claim when that claim is based on the collective bargaining agreement between his union and his employer, an agreement by which the employee is bound and which, properly interpreted, determines his rights.

[6] 29 U.S.C.A. § 185(a).

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES,

Appellant,

vs.

U. S. BULK CARRIERS, INC.,
a body corporate,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; that this case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SAMUEL W. PHILLIPS,
Clerk.

FILED
Apr 4 1969
SAMUEL W. PHILLIPS
Clerk

Relevant Portions of Collective Bargaining Agreement

ARTICLE I

General Working Rules

Deck and Engine Department personnel shall be maintained if the vessel is laid up in a United States port for a period of ten (10) days or less.

When it is expected that said freight or passenger vessel will be idle for a period in excess of ten (10) days, the Unlicensed Personnel required to be maintained under this section may be reduced on arrival. If the vessel resumes service within ten (10) days such vessel's Unlicensed Personnel who are entitled and do return to the vessel for the subsequent voyage shall receive wages and subsistence for the period for which they were laid off. Personnel maintained on board pursuant to this section who do not report for duty and do not perform port work shall not be paid while absent. (Complement of Stewards' Department on passenger vessels in port is subject to the provisions of Article IX, Section 24, "Port Payroll.")

Section 39. *Pay-Off Procedure.* Unlicensed seamen who are dismissed or their employment terminated by the Company shall be paid all wages due them as follows:

(a) If the vessel arrives on or before 12 noon and the seaman is dismissed or employment terminated by the Company that day he shall be paid such wages on that date.

(b) If the vessel arrives after 12 noon the seaman shall be paid such wages not later than 12 noon of the day following dismissal or termination of employment by the Company.

(c) If the seaman is dismissed or employment terminated by the Company while on port payroll he shall be paid on the day of dismissal.

If the above is not complied with, a seaman shall receive wages (and board and lodging unless same have been provided by the Company) until and including day of pay-off, but only if such seaman has presented himself at the designated time and place of his pay-off.

ARTICLE II

Grievances

Section 1. *Department Spokesmen.* The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor to have said grievance adjusted by his respective designated spokesman, in the following manner:

First—Presentation of the complaint to his immediate superior.

Second—Appeal to the head of the department in which the employee involved shall be employed.

Third—Appeal directly to the Master.

Section 2. *Grievance Machinery.* If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent. In the event that

the Company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the Union that the Company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to their head office; however, if such dispute cannot be settled in this manner then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union the dispute shall then be disposed of as provided in Article XII. In no event shall the vessel be delayed pending final settlement of such disputes by the head office of the Company.

SECTION 3. *Authority of Master.* It is specifically understood and agreed that nothing contained in this agreement is intended to or shall be construed so as to restrict in any way the authority of the Master or prevent the obedience of any member of the crew to any lawful order of any superior officer.

Union meetings on board ship are not a valid reason for a man to leave his station unless released by proper authority, and discharge for such unauthorized leaving of post is justified.

ARTICLE III

PORT TIME

SECTION 1. (a) *Commencement of Port Time.* A vessel shall be deemed to have arrived in port thirty (30) minutes after it has anchored or moored at or in the

vicinity of a port (or other place of loading or discharging) for the purpose of loading or discharging cargo, ballast, passengers, or mail; undergoing repairs; taking on fuel, water, or stores; fumigation; lay-up; awaiting orders or berth. This provision shall not apply to emergency anchorage or mooring solely for reasons of safety. It is understood that a vessel is moored when all the lines are out and made fast on the bitts, not just the two lines to put it in position, with the ends coiled down on deck, and all gear necessary for tying up stowed away.

(b) *Termination of Port Time.* A vessel shall be deemed to have departed and port time terminated thirty (30) minutes prior to the time when mooring lines are cast off or anchor is aweigh for the purpose of putting to sea directly.

(c) *Port Time Awaiting Clearance at Quarantine, etc.* Port time shall not apply while awaiting clearance at quarantine; safe weather; awaiting transit of canals; taking on fresh fruits, vegetables, or milk while transiting canals.

(d) *Application of Port Time.* The foregoing definitions of port time and arrival and departure shall apply to all Unlicensed Personnel in all departments covered by this contract.

SECTION 2. *Restriction to Ship.* Overtime shall be paid to all unlicensed crew members for all hours during which they are required to remain aboard the vessel by federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports for purposes of vessel security or for the standing of safety watches from 12:01 A.M. Saturday until 8 A.M. Monday morning and on holidays except, however, no overtime shall be paid crew members when required to remain aboard only because of orders or regulations of

federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports preventing shore leave.

Under the above circumstances the Company shall produce a copy of the government restriction order when the crew is paid off. If it is not possible to get a copy of such restriction order, the Master will prepare a letter stating the terms of restriction for presentation to either the agent of the government or military, and if such agent acknowledges receipt of such letter, this will be ample proof of such restriction. It is incumbent upon the Master to show the delegate a copy of such letter. A letter from the Company's agent or the unsupported statement of the Master will not suffice.

No overtime shall be paid crew members in situations where the safety of the crew requires restriction to the ship (because of heavy seas or winds, etc.) but the Master's denial of shore leave must be supported by clear and reliable evidence as to port conditions, such as regular log entries, and such action must be necessary for the health and/or safety of the crew. Under Disputes Board Decision, Case No. 47, DB 127, overtime for restriction to ship was paid because the facts did not meet the foregoing principle.

SECTION 3. *Medical Exemptions.* Port overtime provisions shall not apply to vessels mooring or anchoring for sole purpose of landing sick or injured persons or for other medical reasons.

ARTICLE IV

OVERTIME

SECTION 1. *Overtime Rates.* (a) The overtime rate of pay for members of the Unlicensed Personnel receiving a basic monthly wage of $380.13 or below shall be $1.89 per hour.

Relevant Portions of Collective Bargaining Agreement

(b) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of $387.61 or above, but not in excess of $442.45, shall be $2.42 per hour.

(c) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of $450.95 or above shall be $2.47 per hour. (Effective June 16, 1962.)

SECTION 2. *Authorization for Overtime Work.* Overtime shall in no case be worked without the prior authorization of the Master or person acting by authority of the Master.

SECTION 3. *Saturdays, Sundays, and Holidays at Sea or in Port.* All work performed at sea or in port on Saturdays, Sundays, and holidays is overtime except as provided in Article I, Section 12, "Emergency Duties".

When a holiday at sea or in port occurs on Saturday or Sunday, the following Monday shall be deemed a holiday and overtime paid for all required to work. No double overtime shall be paid for work performed on holidays falling on Saturdays or Sundays and day workers shall not receive overtime pay unless required to work.

SECTION 4. *Commencement of Overtime.* Overtime shall commence at the time any employee shall be called to report for work outside of his regular schedule provided such member reports for duty within fifteen (15) minutes. Overtime shall commence for members of the Deck Department on Class A and larger passenger vessels and Class B passenger vessels (including the SS SANTA ROSA and SS SANTA PAULA) at the time they are called to report for work outside of their regular schedule provided such Deck Department personnel report for duty within thirty (30)

minutes on Class A and larger passenger vessels and within twenty (20) minutes on Class B passenger vessels. Otherwise overtime shall commence at the actual time such employee reports for duty and such overtime shall continue until the employee is released. (Effective July 16, 1962.)

SECTION 5. *Computation of Overtime.* Where overtime worked is less than one (1) hour, overtime for one (1) full hour shall be paid. Where overtime work exceeds one hour the overtime work performed shall be paid for in one-half hour periods and a fractional part of such period shall count as one-half hour.

SECTION 6. *Continuous Overtime.* When working overtime and crew is knocked off for two (2) hours or less, the overtime shall be paid straight through, except as otherwise specified in this agreement. Time allowed for meals shall not be considered as overtime in this clause.

SECTION 7. *Checking Overtime.* After overtime has been worked, the senior officer of the department on board will present to each employee who has worked overtime a slip stating hours of overtime and nature of work performed. A permanent record will be kept to conform with individual slips for settlement of overtime.

In the event a question arises as to whether work performed under proper direction is payable as overtime, or if claimed overtime is not paid for, the department head rejecting or disputing the overtime shall note on the crew member's slip the reason for non-approval, or the Company shall at the time of pay-off furnish a slip showing the overtime hours rejected and the reason for the rejection.

Members of the Unlicensed Personnel must submit all overtime claims to department heads prior to termination of voyages. Except in cases where a member of the crew is

prevented by some cause beyond his control, no overtime will be considered unless presented within fifteen (15) days after pay-off.

SECTION 8. *Emergency Drills, etc.* No overtime shall be paid for work in connection with drills, inspections, or examinations required by law or emergency work required for the safety of the passengers, crew, vessel, cargo, or another vessel in distress. This clause shall not apply to annual inspection of the vessel. This section, however, is without prejudice to any rights of salvage which the Unlicensed Personnel may have.

SECTION 9. *Payment of Overtime.* All money due crew for overtime work shall be paid at the time of signing off or in any event not more than twenty-four (24) hours after the completion of the voyage.

SECTION 10. *International Date Line.* If a vessel crosses the International Date Line from east to west, and a Saturday, Sunday or holiday is lost, all day workers shall observe the following Monday or the day following a holiday. Watchstanders will be paid overtime in accordance with the principle of Saturday and Sunday overtime at sea. If the Sunday which is lost is also a holiday, or if the following Monday is a holiday, then the following Monday and Tuesday shall be observed.

However, in crossing the International Date Line from west to east, if an extra Saturday, Sunday, or holiday is picked up, only one of such Saturdays, Sundays, or holidays shall be observed and all crew members will be required to work without overtime on the so-called second Saturday, Sunday, or holiday, provided that if Sunday is also a holiday the Sunday which is picked up shall be observed as such holiday.

Relevant Portions of Collective Bargaining Agreement

ARTICLE XII

Arbitration

Section 1. *Settlement of Disputes Prior to Arbitration.* In case a dispute arises over the interpretation of any of the provisions of this agreement, whether the said dispute originates on board ship or ashore, the Union agrees to take the matter up with the Company and make every effort to adjust the said dispute. In the event that no amicable and satisfactory adjustment can be made between the Union and the Company and the question in dispute is deemed to be sufficiently important to either party, the Union or the Company may present the question disputed to the Disputes Board for arbitration as provided herein.

(a) Notwithstanding any of the foregoing any party to a dispute or grievance may waive the grievance and arbitration provisions referred to above whenever a violation of Article I, Section 2 and/or 3 of this agreement shall be alleged. In such event, such dispute or grievance shall be asserted by notice in writing by registered mail or by telegram, return receipt requested, given to the other party. A copy of such notice shall be sent simultaneously to Theodore W. Kheel, the permanent arbitartor under this agreement. Said arbitrator or his designee shall hold an arbitration hearing as expeditiously as possible but in no event later than 24 hours after receipt of said notice. The award of the arbitrator shall issue forthwith and in no event later than 3 hours after the conclusion of the hearing unless the grieving party agrees to waive this limitation with respect to all or part of the relief requested.

(b) The award of the arbitrator shall be in writing and may be issued with or without opinion. If any party desires an opinion, one shall be issued, but its issuance shall not delay compliance with and enforcement of the award.

(c) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(d) The arbitrator shall serve for the duration of the collective bargaining contract unless either party thirty days prior to the semi-annual anniversary date of his appointment requests his removal in writing by notice to the other party and to the arbitrator. In such event or in the event the arbitrator should resign or for other reasons be unable to perform his duties, his successor shall be appointed by the United States Secretary of Labor. Notwithstanding the request for removal or his resignation the incumbent arbitrator shall continue to serve until his successor has been appointed.

SECTION 2. *Arbitration.* A permanent Disputes Board shall be established. This Board shall consist of six (6) members, three (3) of whom shall be appointed by the Union and three (3) by the American Merchant Marine Institute. Substitutes may be appointed at any time upon notice from either party to the other. On alternate months the representatives of the Union and the American Merchant Marine Institute on this Board will select a man from their respective group to act as Chairman, who shall serve in this capacity for such monthly period.

Upon written notice by either the Company or the Union that any dispute cannot be adjusted by their respective representatives, such dispute shall be referred for final adjustment to the Board. The Board shall meet monthly on a fixed date to be designated by the parties. If there are no disputes to be adjusted at any monthly meeting, the meeting may be cancelled by either party on written notice seventy-two (72) hours prior to the scheduled date of such meeting. In the event a majority of the

Board cannot resolve a dispute, it shall be referred, upon the request of either party, to Theodore W. Kheel, the permanent arbitrator under this agreement, his designee or successor, for final decision.

All decisions of the Board and the arbitrator shall be transmitted in writing to all Companies signatory to the agreement and to the Union for uniform application by all parties concerned.

The American Merchant Marine Institute and the Union shall bear the expenses of their respective appointees to the Board, but shall bear equally the expenses of the permanent arbitrator.

SECTION 3. Notwithstanding any of the foregoing, should a dispute or grievance arise under this agreement which, in the opinion of the President of the American Merchant Marine Institute or his designee or the President of the National Maritime Union or his designee, requires expeditious determination, such party may waive the grievance and arbitration provisions referred to above and request the dispute or grievance be referred to arbitration as follows:

(a) The dispute or grievance shall be asserted by notice in writing to the other party and to Theodore W. Kheel, the arbitrator under this agreement. Such notice shall contain a summary of the dispute or grievance and the reasons for requesting a waiver of the contract grievance procedure. Following the receipt of such request the arbitrator or his designee shall, upon the basis of the information submitted and any further information he may have requested from either party, determine whether the matter should be submitted to arbitration or referred back for processing under the regular grievance machinery. In the latter case, the arbitrator shall notify both parties of his decision and the grievance shall be processed as pro-

vided in Sections 1 and 2 of this Article. If the arbitrator or his designee should decide that the request to waive the regular grievance machinery should be granted, he shall so notify both parties and schedule the matter for prompt arbitration.

(b) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(c) Nothing herein shall affect the procedure agreed upon for the resolution of alleged violations of Sections 2 and 3 of Article I of the contract.